In the

Supreme Court of the United States

No. 67.

JOHN F. McLOUTH,
Appellant,

vs.

O. H. ADSIT,
Appellee.

Appellant's Reply Brief.

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Supreme Court of the United States.

October Term, 1899.

No. 67.

JOHN F. MALONY,

vs.

O. H. ADSIT.

APPELLANT'S REPLY BRIEF.

The brief filed on behalf of the appellee, we think, is entitled to a short rejoinder.

I.

On page 5 of appellee's brief it is said:

> "It is conceded by counsel, at page 11 of their brief, the complaint in this case is not an action in forcible entry and detainer, and they proceed to demonstrate this by quoting sections of the Oregon Code defining such actions and providing what must be shown to constitute an unlawful holding by force."

By turning to page 11 of our brief, it will be seen that we said:

> "This complaint neither alleges the forcible entry nor the forcible detention of the property. The Legislature of Oregon saw fit to declare what should be an unlawful holding by force."

Then we quoted sections 3519 and 3520 of Hill's Oregon Code. This language is taken from the third point of our argument, in which we contend that the demurrer to the complaint should have been sustained. That paragraph of our argument begins on page 10, and it starts with the position that the pleader having failed to comply with the statutory provisions which we had copied in the preceeding pages, it would be considered by the law that he endeavored to bring the action as in forcible entry and detainer, under the ruling in *Thompson vs. Wolf*, 6 Or., 308, 311, and *Johnson vs. Crookshanks*, 21 Or., 339. What we said on this entire subject was in the way of legal argument, not as an admission or concession of fact. We do not understand that counsel can make the law by their concessions or admissions, although they may establish facts thereby.

Even a cursory examination of our original brief, pages 6 to 12 inclsuive, will show that we were arguing that the complaint was not sufficient in law, no matter what might be its nature, although under the cases above cited it would have to be treated as in forcible entry and detainer.

II.

The long settled rule is that the jurisdiction of this court on an appeal from the Supreme Court of a Territory, *apart from exceptions duly taken to rulings on the admission or rejection of evidence*, is limited to determining whether the findings of fact support the judgment because these findings are conclusive upon this court. *Harrison vs. Perea*, 168 U. S., 311, 323, and numerous cases there cited. As was said in *Holloway vs. Dunham*, 170 U. S., 615, 617, on the authority of the cases above cited, this court can not examine the evidence as to its weight or sufficiency on an appeal from the Supreme Court of a Territory, and the findings of fact are conclusive.

Again in *Young vs. Amy*, 170 U. S., 179, 183, the court said:

> "It is settled that on error or appeal to the Supreme Court of a Territory this court is without power to re-examine the facts and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this respect has been duly excepted to, and the right to attack the same preserved on the record. Harrison *vs.* Perea. 168 U. S., 311, and authorities there cited."

Counsel for appellee rely upon *Young vs. Amy* to support their proposition that this court can not examine and review the objections to the evidence introduced by the plaintiff without examining the

weight of the evidence and disregarding the facts as found. In that case it is said on page 185 of the report:

> "We will consider the assignments in their logical order. The first to the eleventh, inclusive, and the nineteenth, complain of errors, which it is alleged the Supreme Court committed in admitting certain evidence. But all the evidence objected to was received by the trial court subject to the objection, and the question of its admissibility *turned on that of its irrelevancy and on the quantum of proof which it would establish if considered.*"

We have italicised the clause which clearly distinguishes that case from the one at bar. In *Young vs. Amy*, the questions were, first, of relevancy, second the quantum of proof which the evidence would establish if considered at all. In the case at bar, the assignments, from two and one-half to ninth inclusive, are based upon the action of the trial court in permitting to be introduced and read in evidence certain documents and alleged records notwithstanding objections to their admissibility in evidence for any purpose. *All these objections asserted that the papers and alleged records were incompetent.* See pages 12 to 27 of appellant's original brief. The objections were not on the ground of relevancy alone, nor did they relate to the quantum of proof which would be established thereby if considered. The objections were all of a kind and character not presented by the record in in the case of *Young vs. Amy.* Therefore, that case is applicable to this case as authority only to the

extent that it holds that on appeal from the Supreme Court of a Territory, this court has the power and the right to review errors committed in the admission or rejection of testimony, when the action of the trial court in this respect has been duly excepted to, and the right to attack the same has been preserved on the record.

In the case at bar, the question of the admissibility of the evidence offered turned on its competency. This court can pass upon the question of competeney without examining the weight of the evidence in the record and without disregarding the facts found by the trial court. If this court should consider that papers or alleged records had been admitted in evidence which were not competent as evidence, then it will rightfully reverse the judgment of the court below, to the end that there may be another trial of the case in which such evidence will be excluded, if offered, and not be considered by the court, thus securing a trial and determination of the case according to law.

III.

Near the bottom of page 20 of the record, the trial court, referring to the defendant's objections to certain evidence offered, said:

> "The ground on which I hold these instruments admissible is they are evidence tending to show occupation and possession."

On page 10 of appellee's brief, this language is quoted and counsel say:

> "The original deed to the plaintiff, and oral evidence showing occupation and possession by plaintiff and his grantors since April 19, 1891, was also introduced. This court can not, therefore, consider these objections to *a part only* of the evidence introduced, under the findings of fact as set out by the court, without going into its weight and making independent conclusions of fact. This we have seen, the court will not do."

Section 2387 Revised Statutes was not operative in Alaska until the enactment of the law of March 3, 1891. 26 Stats. 1099. The town of Juneau was entered under the authority of the latter act, October 13, 1893. A patent thereof was issued September 4, 1897. The initiation and continuation of a valid claim to lots in Juneau depended, therefore, upon the establishment and maintenance of occupancy up to October 13, 1893. Such an interest could not be sold before the entry under the townsite law, but for the vendor's occupancy thereof to inure to the benefit of the vendee, the latter must continue the occupancy with no breach in the continuity thereof, for otherwise a stranger could go upon the land and, finding it in a state of abandonment, establish occupancy for himself and defeat the claims of both vendor and vendee.

Carroll vs. Price, 81 Fed. Rep., 137.
Hussey vs. Smith, 99 U. S., 20.
Stringfellow vs. Cain, 99 U. S., 610.

So the questions of occupation and possession were inevitably and, for the reasons above stated,

the controlling questions in the case, and it was with reference to them only that the trial court held admissible in evidence the instruments objected to in assignments of error two and one-half to ninth, inclusive.

Thus, the record shows affirmatively that the court admitted these instruments because it was considered that they were of value in considering the questions of occupation and possession, which, as we have seen, were the great and overshadowing questions in the case, for when two persons claim such property adversely, prior possession gives prior right, and such possessory rights may be conveyed. *Carroll vs. Price*, 81 Fed. Rep., 137.

For years prior to the passage of the townsite law, persons had been in possession of much of the Alaskan lands, and this possession was confirmed by section 8 of the Act of May 17, 1884, which enacts that Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. This gave the inhabitants to understand that eventually those who maintained possession would be clothed with legal title. Transfers of possession could be established by the production of duly executed deeds, or by duly authenticated records. *Carroll vs. Price*, 81 Fed. Rep., 137.

The trial court admitted the pretended writing and records to be introduced upon the theory that they were admissible in evidence for the purpose of

showing occupation and possession. If this court finds from a consideration thereof that they were not admissible in evidence, and therefore should not have been considered as showing occupancy and possession, then it will follow that the judgment of the court below should be reversed.

IV.

On page 12 of appellee's brief it is said:

> "Again, an examination of the record, at page 50, shows that these judgment defendants were served by publication only. It will be seen also by an inspection of the same page of the record that a personal judgment was rendered upon this substituted service."

Thereupon counsel claims that the court had no power to render a judgment *in personam*, that this personal judgment is void, and no sale of lands made upon it could give any title whatever. Counsel are speaking of the sale of the property of the Alaska Mercantile and Packing Company upon a judgment against Van Gasken and Birmingham. Turning to page 50 of the record, we find at the top of the page the usual entry of default against the defendants as "having been regularly served with process by publication and having failed to appear and answer." This entry was made July 13, 1891. On the 25th of July, the court rendered judgment, which is copied on page 50 of the record, and which begins as follows:

> "In this action, the defendant having been regularly served with process, and having failed to appear and answer the plaintiff's

> complaint filed herein, and the legal time for answering having expired and no answer or demurrer having been filed, the default of said defendants in the said premises having been duly entered according to law, now, at this day, * * * it is hereby ordered that judgment be entered herein against said defendants in accordance with the prayer of said plaintiff's complaint on file herein."

Thereupon the court proceeded to render the usual judgment *in personam* against the defendants therein named, "partners or formerly partners as the Alaskan Mercantile and Packing Company, for the sum of $350.75."

We submit that all presumptions lie in favor of this judgment, and that, in view of the recital that the defendants had been regularly served with process, this court will presume, in the absence of evidence to the contrary, that such service was made as justified the court in entering a personal judgment against them.

Respectfully submitted,

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